UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA : 05-CR-060

-against- : U.S. Courthouse

: Brooklyn, New York

MICHAEL MANCUSO
ANTHONY INDELICATO
ANTHONY DONATO
ANTHONY AIELLO

Defendants : July 17, 2008

- - - - - - - - - - - - - - - - - X 2:00 p.m.

BEFORE:
HONORABLE NICHOLAS G. GARAUFIS
United States District Judge

APPEARANCES:

For the Government:
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Minutes Taken Stenographically. Transcript Produced By Computer Aided Transcription.

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(Time noted: 2:18 p.m.)

THE CLERK: United States of America against Michael Mancuso, Anthony Indelicato, Anthony Donato, and Anthony Aiello. Docket Number 05-CR-060.

THE COURT: Please be seated.

THE CLERK: Counsel, please state your appearances for the record.

MR. GOLDBERG: Jeffrey Goldberg and Taryn Merkl for the Government.

Good afternoon, Your Honor.

MS. MERKL: Good afternoon.

THE COURT: Good afternoon.

MR. MANCUSO: Good afternoon, Your Honor.

THE COURT: Mr. Mancuso. Good afternoon, Mr. Mancuso.

MR. SCHOEN: David Schoen and John Mitchell for Mr. Mancuso.

THE COURT: Good afternoon.

Mr. Indelicato.

MR. INDELICATO: Good afternoon, Your Honor.

THE COURT: Good afternoon, sir.

MR. REEVE: Richard Reeve on behalf of Mr. Indelicato.

Good afternoon.

THE COURT: Good afternoon.

Mr. Donato.

MR. DONATO: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Donato.

MR. SERCARZ: Maurice Sercarz for the defendant, Mr. Donato.

Good afternoon.

THE COURT: Good afternoon.

And for Mr. Aiello.

MR. AIELLO: Good afternoon, Your Honor.

THE COURT: Good afternoon, Mr. Aiello.

MS. KELLMAN: Good afternoon, Your Honor.

Susan Kellman appearing for Anthony Aiello.

THE COURT: All right. Very well.

Before we start with the -- with oral argument on the -- on the motions, I just have one bit of news for those who practice regularly before the court. Judge Matsumoto was confirmed this afternoon as a United States District Judge.

So, let's get started. Who's --

Yes, Mr. Schoen.

MR. SCHOEN: I just did this to try to make things a little easier. We sort of agreed on an order among ourselves.

THE COURT: Well, tell me what order that is that you have agreed to among yourselves.

MR. SCHOEN: If it meets the Court's approval,

Your Honor.

First Mr. Sercarz is going to discuss the motions, that caveat that Mr. Donato, if -- we all have, I suppose, joining in all clauses and all of the motions. We've all joined in all the motions. Mr. Sercarz will start off. The Government will respond to that, and then Mr. Reeve was going to go next and then Mr. Mitchell and then I was going to go.

THE COURT: All right.

MR. SCHOEN: And then I guess they would discuss the anonymous jury again. We didn't really discuss this at all, but well, whatever you think. That is the Government's motion.

THE COURT: I have seen everything that you have submitted; so --

MR. SCHOEN: Yes.

THE COURT: -- hopefully you will provide an epiphany application of your positions so that we can move with some efficiency.

MR. SCHOEN: Yes, Your Honor.

THE COURT: So why don't we start with Mr. Sercarz.

Sir, come on up.

MR. SERCARZ: Thank you, Your Honor.

You will be happy to hear that I don't intend to be up here for too long, Your Honor.

I've got two motions that I briefed and that I want

to discuss briefly with the Court. The first is the motion to dismiss that I made in connection with the count of murder in aid of racketeering, Mr. Donato's counts.

And I must say as an officer of the court, that I'm aware that the Court has already ruled in the context of Mr. Basciano's motion for a new trial, that the Santoro homicide qualifies as a Racketeering Act, and that that -- the logic of that decision would foreclose the argument that I am making.

I also note and take account of the arguments in Mr. Goldberg's papers to the effect that my motion may be premature.

Nevertheless, Your Honor, we are aware of the evidence as to the Santoro homicide because the Court has heard it in two separate trials. We are aware regarding a motive that was ascribed for this homicide. And notwithstanding the arguments that the Government has made in its responsive papers, I would respectfully submit that if Mr. Basciano's motive in having this murder committed -- and that is the Government's theory of the case -- is to preempt the kidnapping of his child, that under those circumstances the defendant cannot be guilty of murder in aid of racketeering.

And I am aware of the Government's argument that in order to commit this homicide he sought the aid of the

Genovese crime family and that people went along in assisting in this homicide because Mr. Basciano was -- and I think I'm quoting from Mr. Goldberg's papers -- a trusted Lieutenant of the -- a trusted soldier, rather, in the Bonanno family.

Nevertheless, not every -- with all due respect, not every private vendetta in which members of organized crime are enlisted qualifies as murder in aid of racketeering. The purpose of the act of violence, the violence or the murder, has to be related to the conduct of the enterprise, I would respectfully submit, in the same way that predicate acts must be related.

And in this case what you have, not to use a glib phrase, is the use of racketeering in aid of a murder, not murder in aid of racketeering. I don't think that the Government in the two prior trials of Mr. Basciano advanced a coherent theory as to why this murder benefited the Bonanno crime family or benefited the members of the Bonanno crime family, which would permit support for this count in the context of this indictment against my client.

And I recognize that we haven't even discussed the issue of the possible motive that my client may have had, and for his benefit and the benefit of the other defendants, I must presume that the Government can prove involvement for the purpose of this application.

But even leaving aside questions of the motive of

alleged participants, if the act itself is not for the purpose of racketeering, I respectfully submit that the charges cannot be made and this Court knows enough to know that this count cannot be sustained even though the language of the count tracks the indictment.

That is all I have to say on that subject.

THE COURT: Thank you.

MR. SERCARZ: But with regard to the -- the second item that I briefed, which is the need to have a statement that conforms to the criminal procedure law regarding the Government's proffered expert witness, Mr. Carillo. I understand that the Government has furnished us with transcripts; that there are others that are publicly available to us. I don't think that that qualifies, under the Federal Rules, as a suitable substitute because we still don't know exactly what it is that he intends to say at this trial. Much of it may be objectionable, and the only way to get proper rulings on that is to know in advance.

Now, the Government in its papers has limited the scope of Agent Carillo's testimony at our trial. And I note that it is at Page 36 and 37 of the Government's moving papers they describe that -- and I don't need to quote it all for the record, but they set limits on the testimony they intend to elicit from Agent Carillo. Again, not with as much specificity as I would request, not with as much specificity

as is required by the motion -- by the rules, but we are getting closer.

Here is what I would propose, Your Honor. Given that we have this limitation, and given that we do have the transcripts, and given that the Court has already indicated that there's going to be a second round of motion papers in this case, what I propose is that using this as a limit and reviewing the transcripts of Carillo's testimony in the Basciano trial that at the time that the new motions are due, we make a motion in limine specifically seeking to limit Agent Carillo's expert testimony in any way that we feel is inappropriate. And in that way we are arguing about things that are concrete rather than wasting the Court's time with theoretical arguments that the Court may not need to deal with.

That is it from me.

THE COURT: Thank you.

Mr. Goldberg.

MR. GOLDBERG: Ms. Merkl will be arguing these points.

MR. REEVE: May I just make a suggestion, which is I filed the motion to dismiss. I have a few brief comments. It is very related to the motion to dismiss on behalf of Mr. Donato. It might make sense for me to just address that --

THE COURT: That's fine.

MR. REEVE: -- and then the Government can address it collectively.

THE COURT: That is fine.

MR. REEVE: Thank you.

And I want to just clarify the record because the situation is different now than it was when the motion to dismiss was filed. There is now a new indictment. It's S-9.

THE COURT: Yes. I'm going to get to that as to -- there may be an S-10.

Will there be an S-10.

MR. GOLDBERG: There may be, Judge. Yes.

THE COURT: Well, does S-9 contain everything that it is supposed to?

MR. GOLDBERG: Yes.

THE COURT: In other words, that you intended to.

MR. GOLDBERG: It does. There was an item that was accidentally deleted from S-9 when we sought S-9. It is in S-8. It is the Anthony Aiello gambling charge. That will be added, put back in through S-10. But no other changes.

THE COURT: All right. So S-9 contains everything except that one item that's in S-8 that was left out of S-9.

MR. GOLDBERG: Yes. If I could just briefly summarize the difference between S-8 and S-9.

THE COURT: Yes. Why don't you do that. That might

help.

MR. REEVE: That was what I was just going to address. But I'll -- I'll defer. It relates to my motion.

THE COURT: Well, he may answer some question that you have by telling us what is going on with S-9.

MR. GOLDBERG: Right.

You saw the letter, and I am happy to summarize.

The additional -- an additional predicate act against the Defendant Indelicato, a marijuana charge. There were two predicate acts dropped as to Defendant Aiello. There was an additional Racketeering Act against Aiello that was dropped. I just mentioned that; that was dropped inadvertently. That will be put back. The date of the Pizzolo murder was changed by a day. It wasn't the day that the body was found but the day that the murder actually was committed.

I think that is it.

THE COURT: Okay.

MR. REEVE: And Your Honor, it was in reference to the first change that I think obviously impact on the motion that I filed. Namely, at the time of S-8 in the filing of the motion, Mr. Indelicato was charged with Racketeering Act 2, which is the Santoro murder; and then Racketeering Act Number 4, which relates to the conspiracy to murder of Mr. DeFilippo. There is now a Racketeering Act Number 9 which

names Mr. Indelicato with a marijuana conspiracy.

And so even if the Court were to accept, at this or some other time in the case, my arguments with respect to Racketeering Act Number 2, obviously that would not warrant dismissal given the third racketeering act that is alleged. It would not warrant dismissal of Count 1, which is what my motion says, and it has now been obviously outdated by that change in the indictment.

However --

THE COURT: I see.

MR. REEVE: -- and -- and like Mr. Sercarz, I think, and I do need to note that the Court -- and I believe it was in two rulings in Basciano. There was a ruling on pretrial motions in the Basciano case. It was January 3rd of 2006 --

I am sorry, Your Honor. I don't have the docket number in front of me.

-- in which the Court ruled that the claim on the Santoro murder in the context of a pretrial motion was premature, and I think that obviously is relevant to the claim that I am making now.

In addition, based on the evidence at that first Basciano trial -- and I do have the docket number for this ruling. It was Docket Number 660 -- it was decided on or about December 21st of 2006.

And Your Honor denied Mr. Basciano's motion for

judgment of acquittal on the Santoro murder. The claim there that was made was it was not sufficiently related to the enterprise on both horizontal and vertical grounds, and Your Honor denied that claim. And so obviously those -- those rulings are relevant to the issues that are raised here.

I think that the claim that I have made, which to my knowledge has really not been squarely addressed by the Court -- and I could be wrong about this -- is the specific language in Paragraph 9 of S-9, and that is the language which after the Government gets through all the -- what I would refer to as more ordinary allegations with respect to enterprise activities.

They then go on to say from time to time members of this enterprise committed acts of violence. And I believe the language is "to solve personal grievances and vendettas."

I don't believe, Your Honor, that that language squares with the case law that has been cited, frankly, by both parties. I don't think that it -- it squares with the language of the Second Circuit in *Bruno*, which is a case relied on by the Government and that the Court has alluded to. I think that it goes so -- it makes it so broad that it almost -- to the degree it is inconsistent with *Bruno*, I don't think it should be in the indictment in that form because I think it misleads the jury. It is going to be inconsistent, I think, with the instructions that Your Honor is going to

give because I don't think that a murder that is committed to satisfy a personal vendetta or a grievance is, in fact, part of the enterprise. And that's -- I don't want to get into the facts of *Bruno*. Your Honor distinguish the facts of *Bruno* in the Basciano ruling.

But just as a matter -- is that language proper in a RICO indictment? I think that is a more narrow issue that is ripe at this time before the Court. And -- and I -- and I would ask Your Honor to take a look at that -- at that issue.

I understand the Court's rulings in the past that there is a need for a full evidentiary record on this issue typically, and -- and frankly, part of my motion that I filed was for purposes of preserving issues that have already been decided adversely to me by the Second Circuit. And I am not going to suggest that Your Honor has a basis to look at that issue at this time.

I -- the only other motion that I filed that I would reference at this time is I did file a motion for additional peremptory challenges.

THE COURT: I have it.

MR. REEVE: Frankly, I think -- and obviously I don't want to presume what the Court might want to do, but it's always been my experience that the exercise of peremptories is not the part of jury selection which takes

an inordinate amount of time. If Your Honor wanted to defer that until we see how many jurors we actually have that are not either out by agreement, stricken by cause, we then have a pool and we can make that determination. The Government says, "Well, there is really no basis."

I think the reality here is we have four defendants who are charged with life -- potential life imprisonment without parole. There are likely to be inconsistent defenses in various permutations. And I -- and I think that it's appropriate. It's obviously a discretionary decision by Your Honor. I think the parties agree. Whether or not Your Honor has to decide that right now I defer to the Court on that.

Thank you.

THE COURT: All right. Thank you very much.

Mr. Goldberg.

MR. GOLDBERG: Very briefly, Judge, on the matter of the peremptories, and then I will turn it over to Ms. Merkl to handle those other arguments.

We rely on our papers on the request for additional peremptories, but I would note that I think it would be something Your Honor would need to decide before we bring in the pool because it might require a larger pool.

That's all.

THE COURT: How many do you think I need to bring in under the current circumstance?

MR. GOLDBERG: Based on what we have done in prior trials, I would say at least 300.

THE COURT: Anybody have a different number?

Okay. Ms. Merkl.

MS. MERKL: Thank you, Your Honor.

Good afternoon.

THE COURT: Good afternoon.

MS. MERKL: Starting first with the motions to dismiss, Your Honor, as to both the motion made by Mr. Indelicato and the motion made by Mr. Donato, the Government's position is that the motions are premature. They both touched on evidentiary sufficiency as to the allegations contained in the indictment, and it would be inappropriate for -- that Your Honor to consider the sufficiency of the evidence at this stage.

THE COURT: Well, assuming that the -- that it is proven or it could be proven that a murder took place to solve personal grievances and vendettas, the language that's just been recalled here, how could that be part of a RICO count --

MS. MERKL: Well, Your Honor, will respect to that --

THE COURT: -- as opposed to just a simple, straightforward conspiracy to murder or -- or some other form of murder that might not even be a federal case?

MS. MERKL: If the evidence, in fact, showed that there was no relatedness to the affairs of the enterprise, it would be properly dismissed at the end of the presentation of the evidence.

However, as the Second Circuit held -- has held in numerous cases, including the *Ty* case, relatedness can be proven by establishing either the commission of a particular racketeering act related to the activities of the enterprise or that the defendant was able to commit the particular act due to their position within the enterprise. And it is on this latter prong that we rest the argument that use of resources of the enterprise is sufficient to establish relatedness, both vertically and horizontally under RICO.

THE COURT: Do you believe you will be able to demonstrate that in presenting the case?

MS. MERKL: Absolutely.

And I would note that as both defense counsel conceded that Your Honor has already found such findings with respect to the Santoro murder in the context of the Basciano trial.

So with respect to the --

THE COURT: That was always with respect to Mr. Basciano.

MS. MERKL: Absolutely, Judge.

But with respect to the --

THE COURT: And there may have been -- may be a greater nexus of relationship of the murder to the activities of the enterprise, if they exist at all. If you are dealing with someone who is either that way, who is a principal in the enterprise, as opposed to someone who is brought in, you know, on a pretense -- on a -- based upon an explanation that my son -- you know, this guy is trying to kill my kid; so I've got to deal with him.

MS. MERKL: There -- there is an argument to be made in that regard but I think the flip argument -- the flip slide of the argument can also be made, which is that Mr. Basciano's motive, assuming just arguendo that it was personal in nature, could be ascribed as a personal motivation, a personal thing; however, with respect to the -- his cohorts within the family or within the enterprise, what is their motivation? And that is really a question for the jury.

If their motivation was to please Mr. Basciano or to enhance the relationship with Basciano or to prove themselves to other members of the family by assisting Basciano with crimes of violence, all of which are fact questions, that determination needs to be left to the jury.

So, with respect to this -- Mr. Indelicato's motion I won't belabor the point further, and, you know, just you know, rely on a motion.

But there is one comment Mr. Sercarz has mentioned

that I wanted to address.

And he recommends that -- that this is, you know, racketeering in aid of murder and not murder in aid of racketeering. And I think that places undue reliance on this sort of colloquial title of this statute. The purpose that the Government needs to prove here is not -- you know, under 1959, just to be clear, not speaking out the RICO Count, but if Mr. Donato motions to dismiss Counts 6 through 8, the Government has to prove that the defendant's purpose, or one of their purposes was for gaining entrance to or maintain or increasing a position in an enterprise engaged in racketeering activities.

And Mr. Sercarz's argument seems to conflate the notions of relatedness for RICO purposes and the expressed intent requirement set forth in 1959. And the Government fully expects to establish at trial that Mr. Donato and Mr. Indelicato both were motivated by their desire to assist Mr. Basciano, an individual who was of stature and of growing importance within the Bonanno family and also to, in Mr. Donato's, case assist in his own entry into the family.

Turning now, unless Your Honor has further questions on the motions to dismiss, to the arguments made as to the expert disclosures pertaining to John Carillo, the Government has no objection to the defendant's seeking to file a tailored motion in limine. As the Government has set forth in our

papers and has -- as we've have done in prior trials, Carillo's expected testimony will be focused on explaining the history, general structure, and methods of the La Cosa Nostra family and the particular history of the Bonanno family and the identity and rank of various individuals within the family and, you know, that we expect to have it be limited and we have no objection to, you know, their filing a motion and we will respond appropriately at that time.

THE COURT: All right. That seems reasonable enough. Everyone is in agreement. And it means that when we file we will have a more focused motion and we can have a discussion at that point. So I will hold off on -- on -- I take it the -- in effect the motion -- that motion is withdrawn and will be renewed in -- in a more definitive detailed way closer to the trial.

Is that basically it, Mr. Sercarz?

MR. SERCARZ: Yes.

THE COURT: That's fine.

MS. MERKL: I'll turn it back over to defense counsel, Your Honor.

THE COURT: Okay. Very good.

Mr. Mitchell.

MR. MITCHELL: Good afternoon, Judge.

THE COURT: Good afternoon to you.

MR. MITCHELL: If the Court please, I would like to

discuss for a moment the motion that was made on behalf of Mr. Mancuso seeking severance under Rule 8(a) and 8(b) as an initial observation.

THE COURT: Is there any case law that -- in this Circuit that would require it?

MR. MITCHELL: That would require the severance?

THE COURT: Yes.

MR. MITCHELL: Well, I think so, Your Honor.

THE COURT: And what statute?

MR. MITCHELL: Well, 8(b) -- as I was going to say as an introductory remark, we have challenged both the severance on the basis of the counts and on the defendants, and it appears to be the position of the Second Circuit that the test that is established under 8(b) is the one that applies in -- in these mixed circumstances.

Under 8(b), which is a statute that requires severance as a matter of law, the Government at some points in their memorandum argues about relative prejudice. But the issue here is whether or not the counts are properly joined and the defendants are properly joined as a matter of law.

If Your Honor looks at the -- at the indictment, the test that has to be applied is whether or not the three counts that Mr. Mancuso is charged in -- and the -- and the indictment is somewhat unusual in the sense that the first two counts, as -- as we typically see in RICO indictments, are

normally charged in 1962(c) substantive count and a 1962(d) RICO conspiracy count.

In this case Mr. Mancuso is not charged in any way in either Count 1 or Count 2. He is not charged in participating in either the substantive RICO count or the RICO Conspiracy count, and, of course, he is not charged in any of the predicate acts that are enumerated as part of the pattern. He is charged only in three counts, Your Honor, and those are the three counts: Two 1959 counts, I think it's Counts 2 and 3; and then a count alleging the use of a weapon in connection with a crime of violence.

If Your Honor applies the Rule 8(b) standard which -- which is that in order for joinder to be proffered there must be a finding that the acts that the defendant is charged with were part of the same act or transaction or series of acts or transactions that the other individuals are charged with, I don't know how someone could reach that conclusion because if you go on to examine the other counts in the indictment -- as I said, he is not charged in Count 1 or 2.

If you go on and look at the other indictment, there's another series of 1959 counts involving the alleged murder of DeFilippo. There is another allegation of murder involving Santoro, none of which it's alleged that Mr. Mancuso is criminally liable for or participated in any way.

And then the indictment goes on in counts -- I think it's -- I am not sure what the number of the count is, but there's an individual account that charges Mr. Aiello alone with assault in aid of racketeering.

And then Counts 11 through 16 charged extortionate extensions of credit by Mr. Aiello. And then, finally, the last count charged on Mr. Aiello -- and Mr. Basciano was obviously already been severed with participating in a gambling enterprise in violation of Section 1955. It is hard to imagine how it can be said that these completely unrelated acts are somehow part of the same series of transactions.

The Government cites the *Savonne* case in support of their contention that joinder is proper here. But I think they really ask too much. In -- as an initial observation, the Second Circuit observed in *Savonne* that the -- that the connection was tenuous at best. But more than that, they allowed sever- -- or they allowed joinder there because they found that the counts that Mr. Savonne was charged with was really tied to the whole underlying thesis of the indictment, which was labor racketeering. You don't have that in this case.

In fact, in a recent decision -- well, not so recently. But in a decision, *United States versus Selemy* which is not cited in our brief -- but it's recorded at 152 F.3d 88 at 115; it was decided by the Second Circuit in

1998 -- they described the nature of the prejudice which evolves in an instance where there is misjoinder under 8(b). And what they say -- and I am quoting the decision now.

They say that prejudice occurs in joint trials when proof inadmissible against the defendant becomes a part of the trial solely due to the presence of codefendants as to whom its admission is proper. And that is precisely what Your Honor is going to have -- is going to face in this case if there is not severance.

Every time that there is a piece of testimony or a document or some evidence offered with respect to any of these other counts, including the RICO Counts, we're going to be asking for limiting instructions.

THE COURT: It happens all the time.

MR. MITCHELL: Well, it may happen all of the time, but -- but --

THE COURT: Isn't there a connection in Counts 3 and 4 which have to do with Aiello and Mancuso's alleged participation in the Pizzolo murder? Why should they be severed in that situation?

MR. MITCHELL: Well, those counts can be together, but -- but there's no --

THE COURT: So you're saying that Mr. Aiello should be -- should be tried twice?

MR. MITCHELL: Well, I'm simply I -- I wouldn't put

it --

THE COURT: In other words, once on the racketeering counts and conspiracy, RICO, and then -- but then there should be a separate trial as to the Pizzolo murder as for -- because Mr. Mancuso and Mr. Aiello were together allegedly in committing that.

MR. MITCHELL: Well --

THE COURT: How would we do that?

MR. MITCHELL: -- that might be the consequence.

What I'm here to do is to argue that Mr. Mancuso should not sit through a trial. I wish all of this highly prejudicial proof is going to come out about issues and cases and matters that he has nothing to do with. I mean, that is fundamentally what 8(b) is all about. It's to prevent that sort of prejudice If -- if he's -- if his crimes are not part of the same active transaction; for example, what is the relationship between the alleged Pizzolo murder and these extortions in collections and credit, or gambling conspiracy or an assault of someone? There's absolutely no relationship to those.

And as I say, I am not here to argue anything about Mr. Aiello. I am simply here to argue that my client, under 8(b) as matter of law, is entitled to a severance because there is no basis to join those counts with the -- with the other counts. They are simply not part of the same act or

transaction.

And I would simply, perhaps, wind up my argument by -- by bringing to the Court's attention -- it's a matter -- it's a case that's cited in our brief for a southern district decision by Judge Cedarbaum where the Government argued that the membership of the various individuals in the same enterprise was sufficient glue to satisfy the 8(b) requirements. And the Court wrote that on the face of the indictment the only common thread between the two sets of defendants is that both are charged with criminal conduct allegedly committed in connection with the almighty Latin King/Queen nation, the Latin Kings.

This connection does not transform the disparate criminal conduct into the same act or transaction or series of acts or transactions. If this connection were sufficient to meet Rule 8(b) standard, all members of Latin Kings who committed crimes could be joined in a single indictment.

As I said, Your Honor, the -- the analysis proceeds not from what the Government suggests that it may prove, but from the face of the indictment. And looking at the face of the indictment, I don't believe that anywhere there is a basis to argue that these disparate criminal acts committed by other people with which my client is not charged or linked in any way could possibly be deemed to be part of the same series of acts or transactions.

Thank you, Judge.

THE COURT: Thank you, Mr. Mitchell.

Anyone else on that?

MR. SCHOEN: Your Honor, these issues are just so different. I thought that maybe --

MS. MERKL: Is there a problem?

Your Honor, what's your --

THE COURT: Is there really such a thin connection that we really should be -- we should be trying this case in two parts, one for Mr. Mancuso and the other one for everybody else?

MS. MERKL: The Government generally doesn't think so, Your Honor. And we would note that as an element of the 1959 charges that Mr. Mancuso was charged in, the Government is required to prove the existence of the enterprise and the impact on commerce that the enterprise has.

And in that regard, the evidence that will be admitted at trial -- we anticipate presenting at trial for Your Honor's determination as to admission will prove the relatedness of the various predicate acts alleged in the racketeering counts to establish the existence of the Bonanno family and that evidence would be admissible in a separate trial because the Government has the burden of proof as to the enterprise and that enterprise's impact on commerce as part of the 1959 counts in which Mancuso is tried -- charged.

Excuse me.

So in that regard, the Government feels that there's no basis for severances.

And we would note that Mr. Mitchell failed to address the Second Circuit's analysis in *Savonne* and Judge Sifton's analysis in *Rostelli* which is right on point, which -- in which -- in the *Rostelli* case Judge Sifton concluded that when predicate acts are included in a racketeering count and it's -- or properly indicted as part of a pattern for purposes of racketeering, Rule 8(b) cannot require a closer relationship to establish that these events are connected as a series of actual transactions for the purposes of Rule 8.

And we, you know, rest on our papers but certainly urge the Court to deny Mancuso's motion for severance.

THE COURT: Thank you.

MR. MITCHELL: Judge, may I just respond briefly?

THE COURT: Of course.

MR. MITCHELL: I don't understand the argument that was just made. He is not charged.

THE COURT: It is not your job to understand it. I have to understand it.

Go ahead. I understand. That's a term of art.

Please continue.

MR. MITCHELL: Not very well put.

This is not a case where I am arguing that there is disparate criminal contact -- conduct within the pattern of racketeering activity. He is not charged in the RICO count. He is not charged with any racketeering act. And the fact that the Government has to prove the existence of the enterprise, fine. If you prove the existence of the Bonanno family in order to prove the RICO count and you prove the existence of the Bonanno family in order to prove the 1959 Count, it doesn't somehow relate that conduct, that is to say, the purported murder of Pizzolo, to gambling activities or to the collection of credit activities.

And that is the reason I cited Judge Cedarbaum's decision. I mean, the mere fact that they may be alleged to be members of the same association is not sufficient glue to hold it together. And these arguments about predicate acts, they have nothing to do with my client. He is not charged in the RICO counts.

And with respect to commerce, I mean the Government has to prove a nexus of commerce in every federal case there is. And the fact that it is somehow related to commerce is not sufficient glue to say that you could charge disparate criminal conduct, which it may also somehow be related to conducts, which I'm disinclined.

MS. MERKL: Your Honor, we are certainly not relying on the argument that the defendants are charged as being in

the same enterprise. We are not relying on the alleged membership of these defendants in the Bonanno family. We are relying on the fact that the substantive counts in which Mancuso is charged are also charged as predicate acts in the RICO count.

And on the face of the indictment -- and Mr. Mitchell is correct, Your Honor, is to look at the face of the indictment -- that fact that those substantive counts are part of the pattern of racketeering activity alleged in the RICO established that they are sufficiently related for the purposes of their Rule 8.

We rest on our papers.

MR. MITCHELL: Your Honor, they're not charged as predicate acts. I mean, if you look at the predicate acts, I would like to see somebody show me Mr. Mancuso's name because he's not charged in a single predicate act.

MS. MERKL: I think Your Honor gets our point, which it is the conduct charged as part of the predicate act, not Mr. Mancuso's name.

MR. MITCHELL: The point, Your Honor -- and I'm sorry to belabor the point.

But understanding RICO, I could participate in a predicate act with someone who was a racketeer, and I might not be guilty of racketeering. I could commit, for example, one predicate act with someone, and I wouldn't be guilty of

racketeering. And the fact that that person and I, the racketeer, the person who was guilty of racketeering and me, as codefendant who participated in the single act, that doesn't join me with every other disparate predicate act that exists in that pattern.

THE COURT: But there is no obligation under any case law that I know that there must be a -- an identicality as to every act between the person who is only charged with the -- with a crime as opposed to participation in the racketeering conspiracy.

MR. MITCHELL: Well, in other words, it would be --

THE COURT: It would have to be -- you don't have to have a complete overlay of all of the facts, even though your client is not charged in the racketeering count and is only charged with the substantive act of murder.

MR. MITCHELL: Well -- well, all that I am saying is that the fact that disparate acts can be included under the umbrella of the pattern doesn't have any force with respect to someone who is not charged with the racketeering and who may or may not have been involved in one of the criminal acts that gives rise to a predicate. That doesn't glue him together now for everything else in the indictment.

THE COURT: Don't you have a much stronger argument if your client is only charged with some minor -- relatively minor crime having nothing to do with the major acts charged

in the racketeering counts as opposed to if the crime of murder, which other people are charged with as part of a racketeering conspiracy?

MR. MITCHELL: I -- I -- personally, I don't think the seriousness of the crime is the test.

The question is does that crime -- whatever it is, however serious or less serious it is -- relate to the other activities? Is it part of the same act- -- or transaction or series of transactions, such as the gambling or the extortion extensions of credit or the assault of some other person that he's got nothing to do with, and they are not claiming?

I mean, if, you know, they had charged him in the RICO count that -- then we wouldn't be here arguing. That -- there must be a reason why he is not charged in the RICO count. There must be a reason why the Government elected not to say that he participated in those pattern of racketeering activities. There must be a reason for that, and I think that supports our argument that by simply charging him alone in three substantive crimes, you've got to relate those substantive crimes through the -- to the other substantive crimes and --

THE COURT: I understand your point.

MS. MERKL: Your Honor, do you have a question for me?

THE COURT: No. I am wondering, you know, if --

MS. MERKL: Well, Your Honor, I would --

THE COURT: -- if you can --

MS. MERKL: -- I would just note that with respect to --

THE COURT: -- add something that would enlighten us.

MS. MERKL: -- with respect to the argument as to, you know, a disparate act being related to the racketeering counts when somebody is not charged in the racketeering counts, the Government will point to the *Savonne* case where the Second Circuit squarely held that individuals can be joined for will aid purposes, even when not part of the substantive RICO.

And you know, the notion that this murder was not related to the affairs of the Bonanno family and related as a result to the remaining racketeering acts as charged in the RICO is -- is just not credible, and it's not factually accurate.

With regard to the absence of additional charges, the Government would simply respond that the -- the Court is to look at the face of the indictment, not to draw inferences as to the absence of charges in determining whether there's relatedness but to focus on the charges in the indictment as returned by the Grand Jury.

MR. MITCHELL: Two quick points, Your Honor.

Savonne. The reason -- the reasoning in *Savonne*, which I addressed in my initial presentation -- the reasoning of *Savonne* is that the *Savonne* substantive count related to the under- -- the entire underlying conduct that permeated the indictment, which was laid to racketeering. But the Court, itself, made the observation that the connection was very tenuous.

And with respect to looking at the indictment, I agree with Government counsel. There's nothing -- if you look at the indictment, there's nothing that would let you point to this or that paragraph and say, oh, well that's a -- that's a basis to say that the -- the alleged gambling enterprise or the alleged collection of extortion in credit transactions somehow is part of the same active transaction of the Pizzolo murder.

There is nothing like that.

THE COURT: Thank you.

MR. MITCHELL: Thank you.

MS. MERKL: Your Honor, we have nothing further unless you have something.

THE COURT: All right. Next issue.

MR. SCHOEN: Judge, I'm hoping that -- that the Court's familiarity with the tenets would rule that whoever gets the ball to the net last wins the point, and I think we got the last word in at that point.

THE COURT: Yeah.

MR. SCHOEN: Things that --

THE COURT: I have actually never heard that analogy, and I hope I never hear it again.

MR. SCHOEN: Things had been so conciliatory before Mr. Mitchell got up. I am going to have to apologize for calling his argument; that seems to have changed now.

Judge, I know that the Court has read all of the papers. I know you take the process seriously. So I really just want to cut to the chase.

I think has been a key issue -- not I think. It has been a key issue in this case, at least since last fall. And that is the -- what I call the discovery on the Cicale phony murder plot. That is really what I want to focus my attention on today in my part of the argument. In other words, we rely on the papers, and, in fact, with that -- for that we rely on the papers also but not exclusively.

Judge, I feel like we should step back to February 14th of this year when we -- with different players, and Mr. Buretta was standing here for the Government. And we made the point as strongly as we could that time was passing quickly and that the time for the Cicale documents and information regarding this phony murder plot to see the light of day had long passed, but in any event, it was upon us.

And the Court agreed, and the Court said to the

Government at the time -- in effect, recalling its earlier order granting the continuance of this protective order, the Court said in that order in December of 2007, December 19th, I believe, we are certain that the Government will conclude its investigation and report the invest- -- it's investigation of they matter to the Court and to defense counsel promptly.

And on that day, on February 14th when we would hear Mr. Buretta's position, and the Government's position continues to be in the papers and in response to the papers, and Mr. Basciano's case is, well, we have given them all that we need to give them.

And the Court told the Government something like -- on February 14th something like, well, do more than that and do better than that because the Court took its responsibility very seriously.

Since February 14th, with respect to this Cicale phony murder plot issue, we haven't even gotten as much as the collective sweat off of the Government's brow with respect to this issue. We have nothing still. We have no witness identities that we sought consistently and repeatedly since this issue first surfaced, and I would remind the Court it only surfaced to us by happenstance, frankly, which, again, the Court took seriously and took action to try to remedy after we pointed out to the Court how we had been prejudiced by the -- I will call it the concealment, but the filing under

seal of certain documents.

So the Court left nothing to chance about that anymore. And the Court entered an order that said, I don't want anything filed under seal regarding this issue anymore.

That didn't have the intended impact because the Government has continued to file documents under seal with respect to that issue.

I mean, I have cut ahead in this argument to point out to the Court, as I do in the motion -- as we do in the motion papers. The very real danger of that is a practical and a very important Constitutional one; that is -- and I say that -- the continued filing under seal of documents, this Court spoke to that directly in Mr. Basciano's case and told the Government the Court simply would not have that anymore because it puts the Court in an untenable position.

As we say in our motion papers here and in the rely again, by asking the Court to deny us further discovery and to suggest that the -- and to conclude that the Government has fulfilled its disclosure obligations based on sealed documents puts the Court in the position that the Government stood in with respect to its *Napue*, N-a-p-u-e, obligations, the obligations under *Wallach*.

And those obligations, of course, as the Court knows, are to not permit any witness to testify falsely on the stand. And in this case and in any case which there is reason

to believe that could be a circumstance, to prevent ahead of time that witness from testifying falsely.

The Government's conduct with respect to the sealed documents has put the Court in the position because the Court has an independent obligation, of course, to maintain and insure the integrity of the process and of everything that comes from the witness stand, especially from the Government's side, the Court --

THE COURT: Everybody's side.

MR. SCHOEN: The Government has a special role in this process. It's the Government making the allegations. And I know the Court wants to insure the integrity of that process, but the Court can't possibly know the entire facts -- all of the facts in the case, the entire defense theory of the case, the defense theory of cross-examination in the case, and these are decisions that are going to be relevant at the very time that the witness is testifying up there.

And so let's give a perspective on where we are on the Cicale thing. In my view, Mr. -- I use the vehicle of Mr. Mancuso's case, first because he is our client; but, secondly, it is because I think if we focus on him with respect to Cicale and this information, I think it applies to all of the defendants. If we focus on him, it is most clear, it seems to me, to crystallize the issue.

This is -- as to Mr. Mancuso, notwithstanding the

Government put in its responsive papers without any other reference, this is a single-witness case as to Mr. Mancuso. The case starts and stops with Cicale.

That certainly distinguishes the case, with all due respect to them, from the Basciano case and the Court's post trial motions order in the Basciano regarding this issue. And whether or not it distinguished it, even in that order the Court appropriately invited pretrial motions on this issue, understanding that that would put -- the defendant stands in a different procedure and substantive posture at that point.

But it is a single-witness case. I have said this from the first day I appeared in this case. I said it today. I will always say it.

The case as to Mr. Mancuso starts and stops with a claim by this Cicale about a conversation that naturally he had alone with Mr. Mancuso. And as the Court knows from have heard testimony in the Basciano cases, Cicale, who had this purported conversation with Mr. Mancuso hated Mr. Mancuso, sought permission to kill Mr. Mancuso, set about plotting to kill Mr. Mancuso, enlisted others to help him kill Mr. Mancuso.

The person the Court is asked to rely on now about this private conversation he had in which purportedly Mr. Mancuso because, oh -- in words and in effect, "You know Vinnie told you to do. You ought to do that."

The sum and substance of the entire case as to the Pizzolo murder with respect to Mr. Mancuso, period, start and finish.

That is why this guy, Cicale, is the key here, and that's why everything that has to do with his credibility is absolutely vitally important.

We're asked -- the Court is asked and the jury will be asked to convict a man of a crime that holds a life sentence here based on the word of Cicale and that one incident. That is a shocking proposition, given what we now -- what we knew earlier about Mr. Cicale, frankly, but what we now have strong reason to believe as to Mr. Cicale.

We have -- again, to crystallize the issue, there is no speculation with respect to this issue. What we have is -- this is part of the overview -- credible evidence from a witness the Government has vouched for repeatedly, who has testified for the Government in cases in this district repeatedly, including a death penalty case, and very recently -- and I am not using the names and so on because of this whole protective order issue still, but the Court is aware of all of these facts.

Evidence comes from that credible witness, according to the Government -- and, by the way, we know they have also written letters vouching for that credibility and his value to the Government. The Court is aware of that also.

The credible evidence from that witness that Cicale concocted a phony murder plot in the prison -- and I don't have to detail all of the facts. The Court is familiar with those facts. But the point of it is there is no speculation here.

Once we reach that threshold that we have credible evidence to believe that Cicale engaged in this phony murder plot, we need not be satisfied -- there is no one is this process who should be satisfied with the Government's assertion in the letter -- I think it was February 15th of this year -- Cicale denies the allegations. That is just not sufficient. That is not sufficient to fulfill the Government's obligations, and it certainly doesn't stop our right and ability to investigate. But we don't have the ability to investigate in any kind of meaningful way because we have no access to the witnesses. We have no access to the document. We have been given a handful of selected documents that were submitted to the Court and to us, and those include the correctional officer -- correctional officer's affidavit.

But that only tells us we have to look further; that there really is something here that went on.

Again, I have laid out for the Court in the motion papers each of the items that we seek, and those are only the ones we know about. Each of the items that we seek with respect to this Cicale phony murder plot and the kinds of

witnesses for whom we seek access, not just CW-1 or WI-1 or CW-2 or WI-2. By the way, we still don't even know how many people there are being referred to by these kinds of initials, let alone their identities.

And that troubled the Court when we were up here even in February. But we lay out in the motion papers all of those kinds of things.

But, again, to crystallize the issue, I mean, let's take something that to me has always struck me as one of the most beyond the pale type of documents or set of information, and that is this seven-page letter. We are told by a correctional officer in her affidavit that CW-1, the person who first busted Cicale on this phony murder plot -- that CW-1 wrote a seven-page letter which we're told describes this incident.

Now, we have asked for that, and the Government has responded to Mr. Basciano's lawyers on that point that in an abundance of caution they submitted that document to the Court under seal. That runs beyond the pale. We have to have access to that document.

But most importantly, I think, we should have access to all of the investigative reports on this, the memoranda written by the correctional officers about this. We must have access to the witnesses.

And as I say in the motion papers, I think because

we have, for example, surprisingly offensive provision in the affidavits by the correctional officers, at the end that they were told not to discuss this issue with anyone else. I think that the time has come -- and I don't say that this U.S. Attorney's Office told them that. They don't say who told them that, but they say they were told that.

All of these things, the denial of access to these witnesses -- and it goes beyond, by the way, of course, CW-1 and CW-2. We are told in Officer Santamaggio's second affidavit that many inmates in this Wit Seg Unit were approached by Cicale for the purposes of enlisting them in this phony murder plot, and they rejected him. The fact of the matter is, we ought to be entitled to interview all of those people because when Cicale gets up on the witness stand and denies the allegation, as we are told he does, the Government is going to argue to the Court, I'm pretty sure in further cross-examination on that and calling other witness -- if not for the cross-examination, but calling witnesses about this incident ought to be barred as unduly collateral, and we will deal with that argument at the time.

But, clearly, Judge, given the Court's independent obligation under *Napue*, *Wallach*, and etcetera, let alone the Government's obligation, since we know that these things exist ahead of time, we don't wait until the time of trial to find out how strong is this credible evidence because remember, if

CW-1, the Government's star witness and these other -- in this other case on several occasion at trial, if CW-1 is adamant what happened and detailed in his rendition about what happened, well, then that puts the Court and everybody else on notice that maybe Cicale is not telling the truth in these denials. After all, he has got a great incentive to deny it.

Think of all of the areas of cross-examination that this incident gives rise to. Now, look, there was plenty to play with with Cicale beforehand. This guy is a bad character, a bad actor. There was a lot to cross-examine him on.

But this thing was like manna from heaven in a sense when we learned about this because it seems that there is no end to what this Cicale will do to pervert justice and to try to help himself. I mean, talk about greed. The guy already was designated as a witness with the Government and had an opportunity to help himself, but that wasn't enough. He has to now concoct a phony murder plot in the prison and target a guard on top of it?

But this information alone -- I mean, the Court can reel it off faster than I can and better than I can, but, you know, there is a breach of an agreement here. There is a willingness to breach an agreement. There is no consequence for breaching an agreement. There is the integrity of the act, investigation, which is crucial under *Kyles*. All of

these Constitutionally based decisions.

There is continuing lies and denying the thing. On and on and on. And then at the heart of it, and it really makes this whole underlying incident not collateral is what we are dealing with here, the entire fabrication of whole cloth of a murder plot and who was involved.

Well, that is one of the defense theories in this case, of course; that Cicale concocted whether or not -- concocted his role in the murder plot, but most importantly to Mr. Mancuso, out of whole cloth he put a person into this murder plot that Cicale concocted, solely for purposes of hurting a person that he hated and wanted killed.

Well, here is Cicale again, if the incident is to be believed -- and we are told by CW-1 and others that there is reason to believe that the incident occurred -- that is what he is doing again. While he is in the Government's employ, he is concocting out of whole cloth a fabricated role for people in a murder.

Judge, I lay out in my thing, as I say, all of the different things. I mean, there is no point in my reading a list of 20 or 30 items. But again, the day is -- the hour is late as to all of this stuff. We need all of these things. This is not a close question on this one.

Thank you very much, sir.

THE COURT: Thank you.

Mr. Goldberg.

MR. GOLDBERG: Your Honor, that was powerful summation, but the question before the court is a straightforward one: Has the Government complied with its *Brady* obligations and its Rule 16 obligations.

We set forth in our papers how we have not only complied; we have gone above and beyond what the Court and the law requires.

With respect to *Brady*, it is clear that a defendant cannot use *Brady* as a tool to force the Government to investigate details -- evidentiary details that the defendant wants the Government to investigate. The Government has disclosed, and I know this is set forth in our papers but I think it is worth mentioning, the name of the inmate, we have described the statements that the inmate claims that Cicale made, we have provided in camera the statement from CW-1, we have provided the contact information for the inmate's attorney, we have provided the affidavits prepared by prison employees in relation to the alleged phony plot, and we have specifically responded to, point by point, the request by both Mr. Mancuso's attorney and Mr. Basciano's attorneys.

Simply put, we have nothing further to produce about the purported allegations.

Rule 16, as we have indicated in our papers, provides no further relief because the question is one of

materiality. And although it is in a slightly different context, Your Honor has already ruled on March 24 that these matters are not material because the defense is already aware of the basic contours of the allegations, and they could look into them.

With respect to this grand claim that Dominick Cicale is the end game with respect to Mr. Mancuso, we have indicated in our papers and Mr. Schoen fails to recognize it here that there is a recording that I'm sure Your Honor is fully familiar with where Vinnie Basciano identifies Michael Mancuso as the person who gives the final order to kill Randy Pizzolo.

Unless the Court has further questions, that is it.

Thank you.

THE COURT: Anything further?

MR. SCHOEN: Certainly after they have given point-by-point responses to our request, the response has been, for the most part, you don't get any more. Nice request, but sorry.

I'll say it again. Dominic Cicale is the starting and end point with respect to this entire case against Mr. Mancuso. I know Mr. Goldberg to be an honest guy. I know he is not intentionally misstating the record, but it's hardly at this point now -- I know the Government has taken offense in maybe the way I have done it, and maybe it was offensive.

THE COURT: Just --

MR. SCHOEN: But anyway, anyone -- anyone who looks to -- anyone who looks at and listens to these tapes to which Mr. Goldberg refers would come to the exact opposite conclusion. It is not possible to fairly read the Basciano Massino tapes to come to the conclusion that Mr. Mancuso not only gave of the final order, even knew about the Cicale plan to kill Pizzolo. It's just not possible.

And, again, there are a million examples -- and that is an exaggeration. There are many examples in those tapes that prove the point.

But getting to the end, one of the, again, best illustrations of it is there is a discussion on the tapes about what is going on. Massino wants to know what is going on with Cicale out there and Mancuso. There is dissension on the streets and all that.

And Basciano tells him on that second tape that he thinks that Mancuso probably suspects that Cicale had Pizzolo killed; and, therefore, he is worried and he is scared that something like that could happen to him. That is not possible to reconcile with the idea that Mr. Mancuso ordered the hit, plus there are places on the tape when Basciano says, "I did it. This is just me," and all that. There are many, many examples in there. We can't take an isolated incident.

And they did it -- you know, we are going to get to

it, I am afraid, with the anonymous jury thing. They did it again there. It is completely out of context, and it is simply not a fair reading.

Again, that is not a close call. Rule 16 we do say provides an independent basis, and I have cited the exact rule that clearly this is material to preparing a defense. The whole defense in the case is cross-examination of Dominick Cicale.

THE COURT: All right. Thank you.

MR. SCHOEN: Thank you, Your Honor.

THE COURT: On the anonymous jury.

MR. SCHOEN: Can I just go first on that, Judge? Is there motion?

MR. GOLDBERG: If the Court has questions; otherwise, well rely on our papers.

MR. SCHOEN: I would like just a moment to get my notebook.

THE COURT: Sure.

MR. SCHOEN: I am the one who has to catch a plane; so I will make it brief, Your Honor.

THE COURT: I have a few things to say too.

MR. SCHOEN: All right.

THE COURT: Go ahead.

That should shorten your decision.

MR. SCHOEN: Yes, Your Honor. It does.

Judge, on the anonymous jury, I mean, the -- unfortunately, as the Court is aware, I tend to be too wordy in the written submission; so I would like to cut to the chase here.

And that is the thrust of the Government's argument is this is an organized crime case; therefore, there should be -- that is the underlying thrust of the argument. This is an organized crime case; therefore, there should be an anonymous jury because organized defendants, after all, are dangerous, et cetera.

Now, the Court knows, and has written extensively -- and the Government knows.

The Court has written extensively to this -- to this notion; that is that we cannot just grant an anonymous jury based on organized crime or allegations of organized crime membership. So what the Government has done in this case has reached and tried to fit in evidence that the believe or suggest to the Court fits into the various prongs.

Now, we took issue in our papers the Government's five-factor case. I had my three-factor Second Circuit case. What do I say? I mean, certainly the five-factor case -- the five factors the Government suggests resemble what the other Courts have used, and in a couple of cases in this district have actually been used by the Court.

So whichever we go with, I think -- what I have to

ask the Court -- and I may be, someone suggested, you know, running uphill on this because I know this is the trend in this district. But we always have to take a step back and remember the principles. And the underlying principles are it is a dramatically disfavored exception, only to be used when genuinely called for based on sufficiently -- a sufficient -- sufficiently strong reason to believe that the jury would need protection. It is a drastic measure.

The bottom line -- we address each of the factors in this. The bottom line is as to Mr. Mancuso, my client, and that is all that I am raising here. And as I say in the papers, I don't want to step on anyone else's feet with respect to facts. Everyone joins in the motion. If anyone has separate submissions to make on the facts, I am open to them.

But the bottom line is there is absolutely no evidence in his history of the kinds of things that are appropriate considerations for an anonymous jury. That is no evidence of jury tampering or obstruction or willingness to interfere with the jury process. It is certainly not sufficient to justify this kind of drastic and disfavored exception.

And that is really what the *Blackshire* case in the Second Circuit says we focus on, and not all of these other kinds of things.

Again, I think, wordy or not, I address these in motion papers.

THE COURT: All right. Thank you.

MR. SCHOEN: Thank you.

THE COURT: Does anyone else want to speak to the issue on the defense side?

MR. SERCARZ: I would like to make an observation, Your Honor.

The way that the motion papers were presented to the Court, you were sort of given an either/or choice. You were given the choice not to consider an anonymous jury, to reject it here because the proof has not been made that it is appropriate here, and we all joined in that; or do we impose a certain set of remedies that we -- for which we use the shorthand of an anonymous jury.

By anonymity isn't the only remedy that is being proposed here. It is also being proposed that the jurors be transported by agents of law enforcement to a certain place away from the courthouse, meaning that the very first thing that happens to them in the morning and the last thing that happens to them at night is that their, quote, unquote, safety is being assured by being accompanied by law enforcement.

The observation is made that a neutral explanation dealing with jury privacy can be provided, but in the course of a six- or eight-week or ten-week trial, on a daily basis

that explanation is, to some degree, belied when there are days during the trial when the press does not appear or it turns out that the case gets less newspaper and media coverage than we anticipate and yet the marshals are transporting these the anonymous jurors day in and day out.

And, To me, it is strange credulity to believe that the jury is not going to infer from that that there is some concern about their safety.

You have heard the arguments as to whether or not the threshold has been met, but the Court has not heard any arguments about whether or not there are less intrusive alternatives than the ones that have customarily been used in this district to insure that the Court will have no concern about jury tampering, and yet which are more likely to afford these defendants the fair trial to which they are entitled which is free of prejudice.

I was not going to raise the issue of alternatives because it weakens the argument that the Government has not really met the threshold of requiring jury anonymity and all that goes with it. But I would like an opportunity, and if now is my only opportunity, I will speak to it.

But I would like the opportunity to propose in the event that this Court is going to find that some form of protection, in quotes, is necessary, that we have the opportunity to speak to the Court on a methodology that is

less intrusive to our clients's right over the course of a six- to eight-week trial. If the Court says now is the only time, I am ready to talk to you about that.

If the Court wishes to rule first on the issue of jury anonymity and the attendant factors but give us an opportunity to talk about other things, I would like to avail myself of that, if I may.

THE COURT: What is the -- what is the harm to the defense in jury anonymity to the extent that it has been proposed, wherein they are going to know a great deal about the individual members of the venire. You are not going to know their names, their addresses, or their phone numbers. You will know the neighborhood they live in, the county. You will know, you know, their ethnic background, their education, and various other elements of their background, but you just won't know certain rather specific identifying information.

MR. SERCARZ: A hypothetical. And maybe the Government would be the one who was prejudiced by this one.

The defendant says he works for a -- withdrawn.

The potential juror says he works for a construction company. We don't get his name. Unbeknownst to any of us, this construction company is a construction company which is allegedly infiltrated by organized crime.

Has somebody been deprived of a material piece of information?

The construction company is one that is allegedly under investigation because of ties to organized crime. The company has allegedly been the victim of an extortion by someone. Without the information regarding the individual's place of employment, including the name of that place of employment, a critical piece of information is lost that one side or another might use in order to render a challenge for cause.

And I am deliberately using an example where the Government is probably being deprived of salient information that they would use to exercise a challenge for cause, and I am doing it for a reason.

THE COURT: Right.

MR. SERCARZ: Whenever we -- okay.

THE COURT: There are ways of dealing with that in voir dire, as we do it all of the time, particularly in these more serious cases when there are individuals who are dealing in death penalty cases where we go into extensive questioning. Sometimes the questioning takes place by the Court without the parties present in order to elicit certain that maybe -- that the Court believes is -- may be found germane to the decision, and then that is related to the attorneys.

And the way I handle it, quite frankly, is if any of the attorneys believe that more information is needed in order to have a fulsome understanding of the background of the

potential juror, then we -- we fashioned a method of obtaining that information that will not have the outcome of disclosing the juror's name, address, and phone number. And it may just be in some cases that is not possible, but in most cases I think we have been very successful.

You know, I interviewed 269 prospective jurors in my death penalty trial individually. My sense is that we received a great deal of information about those potential jurors that was not disclosed in their questionnaires, and we followed it up on answers that didn't provide sufficient information so that the Court and the attorneys could make appropriate and informed decisions about whether to strike certain juror candidates.

I understand your point, but there are ways of dealing with that in an anonymous jury context.

I would be a little more interested in -- in knowing how you think we might resolve the question, should I think that it is -- some sort of protection is needed, physical protection of the jurors. How would we solve the problem with respect to the question of a semi-sequestered jury?

Do you have anything on that?

MR. SERCARZ: Yes.

The answer that I have always given is as follows, Your Honor.

In the annals of those cases in which jury tampering

has been found, it has, to my knowledge, always been the case that only one juror has been approached, and that that individual has been designated as a juror at the time that that individual has approached -- has been approached.

What I am about to suggest --

THE COURT: I am sorry. Has been designated by whom?

MR. SERCARZ: Let me -- let me get to the punch line, and you will see where I am going.

I proposed in other cases, Your Honor, as a less onerous method of jury selection and one that preserves more of the defendants's rights that rather than selection 12 jurors and the requisite number of alternates, that you select 18 people at once, and that the decision is not made until the eve of jury deliberation as to which 12 are going to serve on the jury and which six or four or two are going to be the alternates.

It has the salutary effect of making sure that all of these people listen throughout the trial because every one of them is going to be serving on the jury, and there are cases where protection of some sort would be helpful or necessary, the threshold has been met, but that kind of a safeguard would be enough to insure that people are not approached for improper purpose.

THE COURT: Which 12 will I select?

MR. SERCARZ: It can be done by lot on the eve of deliberation. And from the time that the jury is selected and the alternates are discharged, then at that point measures can be taken during the deliberations to safeguard the sanctity of the jury's deliberation.

I would urge that instead of transporting people to a single place throughout the course of the trial, day in and day out, back and forth. Indeed, I feel that it is enough to overcome the need for anonymity in virtually all of the cases where an anonymous and impartially sequestered jury has been granted.

THE COURT: Okay. Mr. Schoen, do you have an idea too?

MR. SCHOEN: Yes, Your Honor.

I have to respond to one paragraph.

The Court asked the question a moment ago, what prejudice do we suffer really here, given that the Court's questioning, the intensity is exhaustive, et cetera. And the answer was the information base is kind of prejudiced. We may have a problem with getting information. That is, of course, one of the problems.

Frankly, I see I may be spitting in the wind here, but I have to do it because of the very serious proposition that each of us in this process has to take control of, and that is the whole idea of an anonymous jury. I know the Court

takes it seriously, but we as lawyers have to take it seriously also.

I am going to give you one paragraph on what prejudice is. And prejudice is much more direct than lack of information. It is what is put in the jurors's minds. I am going to quote from a guy here. I put it in my papers, Page 5. One of the most courageous judges in the South during the Civil Rights period in my book of unlikely heroes.

Frank Johnson wrote on this question when he granted it. This is my friend, and this is my mentor. I quote him for that reason, frankly, because I respect what he writes and says.

He said, "Unquestionably, the empanelment of an anonymous jury is a drastic measure, one that should be undertaken only in limited and carefully delineated circumstances."

We are all on the same page with that.

"An anonymous jury raises the specter that the defendant is a dangerous period from whom the jurors must be protected, thereby ^implicating the defendant's Constitutional right to a presumption of innocence, the enforcement of which lies the foundation of our administrate -- our administration of our -- the administration of our criminal law."

That is fundamentally where the prejudice comes in, besides you have an informational perspective. And I know

that the Court didn't mean it, but when we get into a discussion about, well, what prejudice would they suffer anyway because we ask a lot of questions, I appreciate the Court's intended thoroughness in asking those questions. I don't mean to not acknowledge that.

But it just doesn't -- the prejudice is there, and the alternative is root to the basis of a process that we are told has to be addressed, one, only in exceptional circumstances for a reason: Because it puts something in the minds of these jurors, and no juror can ignore it.

That is what I think is really the answer to what prejudice we suffer. As corny as it might sound, that is my view on it.

MR. GOLDBERG: Your Honor, three quick points.

First, the Second Circuit, by virtue of its decisions on anonymous juries, has acknowledged and -- that passage and gone in a different direction.

Second, Mr. Sercarz's suggestion about having 18 and then choosing 12 on the eve of trial rings a bell with me because I think he suggested it about years ago in a case --

MR. SERCARZ: I did.

MR. GOLDBERG: -- that we -- we faced each other, and the Judge declined to do that. And the reason is because although it may reduce the risk of tampering, it certainly doesn't eliminate it.

And, third, we can talk about what measures can be taken to reduce the prejudice -- the prejudice to the defendants of having marshals with them all day long, but one thing that comes to mind is -- is having Your Honor routinely instruct the jurors; again, remind them they should draw no inference for or against the defendants in light of that protection.

Thank you.

MR. SCHOEN: Just to kind of close all this, I just want to say that -- I said that this seven-page letter may be the most clear example of something beyond the pale. I think there is something that is maybe more beyond the pale.

How about if we make -- the Court make the Government choose, at least, and disclose who is telling the truth between its witness in the other case who said unequivocally Cicale gave him this phony murder plot and enlisted other in it or Cicale.

If the other fellow is lying, what are the -- what are the consequences to him? They cannot both be telling the truth. That is 100 percent sure. Maybe that is a more basic request.

THE COURT: All right. Thank you.

MR. MITCHELL: I'm sorry. Just one -- one issue on the anonymous jury.

And that is that I don't believe -- and I might be

wrong, and the Government can correct me if I am wrong -- but Attorney Schoen represented that there is no allegation in the original allegations with respect to Mr. Mancuso of obstruction and tampering.

To my knowledge, based on the Government's pleading, to my knowledge in this case there are no allegations with respect to any of the four defendants who are scheduled to start trial before Your Honor.

And I want to complete the record. I understand that there are allegations against other alleged members of the family, but with respect to specific individualized allegations with reference to any of the defendants on trial here, I don't believe there are any. I can be corrected on that, but I don't believe the Government has so represented.

THE COURT: All right. Thank you.

MR. GOLDBERG: Your Honor, I need to correct something. I'm sorry.

One of the charges that the Pizzolo murder was an obstruction of justice.

THE COURT: Which murder?

MR. GOLDBERG: The Pizzolo murder.

We indicated in our papers that -- that Mr. Basciano indicated that Mr. Mancuso had told him that Randy Pizzolo was a rat, and so there is an allegation with respect to Defendants Aiello and Mancuso that there was obstruction in

this case. Your Honor is fully aware that the case law indicates that the defendants on trial do not need to have participated in any way in tampering for there to be an anonymous jury.

THE COURT: Yes.

MR. SCHOEN: I mean, you know, again, as you said, Judge, we addressed that in the papers. But, again, taking out of context, this case has been tried before the Court a couple of times, the Pizzolo murder. There was never a theory put forward that Pizzolo was killed because of the suspicion that he was a rat. That is simply not there to suggest that that is the case.

MR. GOLDBERG: The Pizzolo murder has not been tried.

MR. SCHOEN: I understand, but there have been allegations that --

THE COURT: I know.

But I thought you said that I had tried the Pizzolo murder, and so I don't know everything there is to know about the Government's purported facts on the Pizzolo murder.

MR. SCHOEN: I mean, I pointed out already that 404(b) evidence on the Pizzolo murder has come in, the Court has had that before it. There is 3500 material from Cicale about it. There has never been put forward a theory that he was killed because he was a rat. And more than that, the same

tapes that he has drawn all of the excerpts from go on and on and on about how misguided that yahoo purportedly was for killing the guy because he was a jerk. Massino tells him, "We don't do things like that, kill a guy because he is a jerk or a braggart." Nobody said because he is a rat.

THE COURT: Anyone else?

MR. SERCARZ: Not on this point, but before we adjourn, may I have a moment with my client? I want to -- there have been some logical issues regarding the receipt of materials, and I want to make sure --

THE COURT: All right.

MR. SERCARZ: -- there is nothing --

THE COURT: I am not done.

MR. SERCARZ: Okay.

THE COURT: So when I am done --

MR. SERCARZ: Thank you.

THE COURT: -- then you can meet with your client.

If there is something that you want to bring to the Court's attention --

MR. SERCARZ: There may be, but I'll wait.

THE COURT: Well, let's -- I am going to reserve on the motions. And I have one other item to discuss.

Now, Mr. Goldberg, about how long do you think that the Government's case is going to take, assuming we go ahead as is currently planned.

MR. GOLDBERG: I think once we start with opening statements, about six to eight weeks.

THE COURT: All right. All right. Thank you.

Now, this trial is anticipated to last at least six weeks, and the Court expects that the parties will call dozens of witnesses.

Is that a fair statement?

MR. GOLDBERG: It is, Your Honor.

THE COURT: Okay. In consideration of the frailty of human memory, the Court intends to institute a new procedure at trials exceeding two weeks in duration, one that is currently in practice in a number of courts around the nation. The Court plans to take photographs of testifying witnesses and allow the jury to use those photographs during deliberation as a demonstrative aid.

I want to emphasize at the outset, particularly since this would be the first time that this Court has used such a procedure, that any pictures taken will be strictly for the use of the jury only and not be disseminated to anyone else.

After a verdict is reached, photographs will be retrieved by the clerk of the court and destroyed. The Court is cognizant of the important potential safety concerns of cooperating witnesses and undercover officers and other sensitive witnesses and will carefully monitor the taking,

use, and disposal of such photographs.

With that said, the Court believes that it would be extremely useful in such a long trial for the jurors to be able to refresh their memories about witnesses's testimony.

The manual of complex litigation states that, quote, jurors understand better and understand more when information is presented both visually and verbally, end quote.

Being able to view these photographs is a corollary to the jurors's ability to take notes.

As I mentioned, this procedure has been employed by a number of district courts, and this Court has not been able to find any law in this Circuit that bars this Court from doing the same.

Note, *U.S. v Johnson*, 362 F.Supp.2d, Northern District of Iowa 2005. Finding that photographs of testifying witnesses qualifies as demonstrative exhibits and that, quote, showing the jurors photographs of witnesses at the end of the trial that is likely to last three months or more and likely to involve over 100 witnesses would be an effective way to refresh the jurors's memories as to the testimony of particular witnesses, end quote.

Specifically, the Court will employ the procedure that is currently used by a number of district court judges in the District of Minnesota. Counsel will be directed to forewarn each witness that my clerk will take their photo

beside the witness stand when they come in; that way all of the photos will be identical, at least in background. The witness, after being photographed, will be sworn and testify.

At the end of the trial and after inspection by the parties, the photos will then be provided to the jury for their deliberations to assist the jurors's recollection of the witness -- witnesses as they evaluate the testimony in the case.

And, finally, the photos will be destroyed after the jury reaches its verdict.

The Court believes that this procedure will be extremely helpful to jurors. The Court does not know if there are any objections from the parties in this case, but to the extent that there are any such objections, the parties are directed to file those objections with the Court no later than noon on July 31st, 2008, two weeks from today.

So is there anything else?

MR. GOLDBERG: Not from the Government, Your Honor.

MR. SERCARZ: Your Honor, I have a scheduling issue. I think I can address the issue.

THE COURT: Okay. Go ahead.

MR. SERCARZ: I want to talk about with regard to Mr. Donato.

But if I recall correctly, and I may be wrong, there is a deadline for 404(b) disclosure, and we agree that there

was going to be another round of motions -- in limine motions, but we didn't schedule it.

Am I right?

MR. GOLDBERG: I don't believe that we have scheduled a deadline for the 404(b) either.

MR. SERCARZ: Does the Court wish to address these issues now or --

THE COURT: Well, let me hear from the Government since this is about 404(b).

MR. GOLDBERG: Well, what we were planning on doing was filing our 404(b) motion four or five weeks before the start of opening statements.

THE COURT: Remind me.

MR. GOLDBERG: Handing out questionnaires on September 2. It usually takes about two weeks before we get to openings; so we are thinking about we can do August 15th, which is actually the same deadline for the 3500 material and the exhibits.

THE COURT: That sounds fine to me.

Any problem with that?

MR. SERCARZ: The Court agreed that there would need to be a second round of motions. What prompted it is, as I mentioned, for example, that with regard to the disks or the purported conversations that the Government intended to introduce, there may be different confrontations and hearsay

concerns in this trial than there were in the trial when all of these statements presumably came in as admissions because Mr. Basciano was a participant in the conversations, and he was the one on trial.

If I recall correctly, without the minutes the Court said, yes. I can see there will be a second round of motions.

THE COURT: All right.

MR. SERCARZ: We are going to have an in limine motion regarding the expert, Agent Carillo, as well. I thought it might be helpful if we try to schedule that now.

THE COURT: Well, August 15th?

MR. SERCARZ: Your Honor, may I suggest that we have an opportunity to review the 404(b) material and to make our objections to that because that may inform any in limine motion we are making as well. My suggestion was going to be to do it later, and I hasten to ask --

THE COURT: I am sorry.

MR. SERCARZ: We can do it later, with time to digest the 404(b) material that we were given.

THE COURT: I need to digest the motions, we are -- we are moving in the direction of the trial here.

The 22nd of August for any motions?

MR. SERCARZ: Your Honor, I will be away the week of the 18th.

Can we do it the 25th, which is a Monday?

THE COURT: That is fine.

Response from the Government, September 5th?

MR. GOLDBERG: That is fine.

THE COURT: All right.

MR. SCHOEN: I know everybody else is probably familiar with the regular schedule, but no court on Fridays?

THE COURT: Well --

MR. SCHOEN: We have those funny weeks.

THE COURT: We have the funny weeks with the Jewish holidays, and I thank you for the letter laying out the schedules for the Jewish holidays. My sense is that in the weeks in which we are taking two days for the Jewish holidays we will work a Friday. Otherwise, on weeks when we are -- when we can go Monday through Thursday we will not work a Friday.

MR. SCHOEN: Thank you, Judge.

THE COURT: Oh, no, no. We won't have a trial on Friday. You will work the Friday.

MR. SCHOEN: Yes.

MR. REEVE: Your Honor, for informational purposes only.

I have discussed this with Government counsel. I recently learned that Mr. Indelicato is having some health problems. A series of test, upper GI tests were ordered. He was advised by the medical unit there that those --

sometimes -- the period is anywhere from 30 days to 90 days to get the tests done. I want to make sure that it happens well in advance so that if there are problems it can be dealt with before the trial starts.

I'm going to make an effort. The Government is going to make an effort. If I need the Court's assistance, I will let the Your Honor know. I just wanted to inform the Court.

THE COURT: Is he at the MDC?

MR. REEVE: Yes. He is, Your Honor. He is here.

THE COURT: All right.

MR. REEVE: We'll work on it, but I just wanted to highlight it.

THE COURT: You or Mr. Goldberg should let me know if there is a problem, and I will contact the warden, if necessary. I will try to move this along.

MR. REEVE: Thank you, Your Honor.

THE COURT: It needs to be handled before the trial, obviously.

MR. REEVE: Yes.

THE COURT: All right.

MR. REEVE: Thank you.

MR. SERCARZ: Your Honor, rather than wasting time by talking to Mr. Donato now and then come being back, it is my intent to make a motion to the Court and serve the

Government in connection with the fact there are only limited areas where the defendants can read disks of transcripts and have codefendant meetings with the disks available. I understand that those areas are in short supply.

In the event that I require the assistance of the Court in order to receive permission for those meetings, I would like the opportunity upon notice to the Government.

THE COURT: I take it that your client has been looking at these materials all along.

MR. SERCARZ: He has seen materials. There are some related to the second Basciano trial that are relevant to him that he hasn't seen.

THE COURT: When did that end? That was a long time ago.

MR. SERCARZ: Consider the blame mine in the effort to keep my client apprised and to allow him to participate in his own defense in a meaningful way, it would be better that he saw a disk rather than a hard transcript. And I understand that because there are a number of cases in which a number of defendants need access to a limited number of computers there have been problems.

MR. REEVE: And, Your Honor, to be fair, we just received letters -- discovery letters from the Government that indicates a number of CD of conversations and so there is new material that none of us have had access to and will obviously

pursue, and so it is relevant to that material as well.

THE COURT: Now, what I would suggest is that if you believe that your clients need additional library time to review the documents that are on disk that you first discuss it with the Government and have the Government contact the legal department at the MDC to attempt to arrange additional time. And if that doesn't work, then contact me.

MR. SERCARZ: Thank you, Your Honor.

THE COURT: Ms. Kellman, welcome.

Did you want to argue anything?

MS. KELLMAN: No. I will save my argument for the trial.

I just wanted to say, Judge, that in other cases there is a tremendous amount of disks that caused a problem at the MDC. The Government counsel and I have spoken on two other cases with Adam Johnson over at the MDC, and they have actually set up a war room where the defendants, without their lawyers, but have access to all of the computers to work separate on computers, separate from the library. And usually it's just a call from the United States Attorney's Office, "We need to be able to include these disks. Can you send them up there?" They ought to be able to provide access.

THE COURT: Mr. Goldberg.

MR. GOLDBERG: We will work it out. I am not hearing there is a problem at the moment. If there is, I will

make the calls that are necessary.

THE COURT: Fine.

Let me know if there is a problem.

All right. Is there anything else from the Government?

MR. GOLDBERG: No, Your Honor.

THE COURT: Anything else from the defense?

MR. REEVE: No, Your Honor.

Thank you.

MR. SERCARZ: No, Your Honor.

THE COURT: All right. We are -- our next meeting is when, the 2nd?

Oh, we should discuss the questionnaire. Is it ready?

MR. GOLDBERG: Your Honor, we supplied a questionnaire back in March. Your Honor has invited defense counsel to make objections or communicate objections to us.

I got an e-mail late last night highlighting some areas. I don't know if all of the defense attorneys have had an opportunity to review that. It came from Mr. Schoen.

Mr. Sercarz made a good suggestion, which I agree with, and that is there be some communication offline and we can resolve whatever problems there might exist. I would expect it can happen soon because -- subject, of course, to Your Honor's ruling on the anonymous jury motion, we will need

to start preparing those.

THE COURT: I think that we ought to reschedule one pretrial conference here in August so that we can go over any issues that occur in the next 30 days.

So is everyone available on the 21st or 22nd of August? Who is not here?

MS. KELLMAN: I am not.

MR. SERCARZ: I am not. That is my bad week.

THE COURT: The 25th of August? That is a Monday.

MR. SERCARZ: I am available.

THE COURT: Is everybody available?

MR. SERCARZ: Yes, Your Honor.

MS. KELLMAN: If we do the 26th, it would be easier for me.

THE COURT: The 26th of August at 11:00 a.m.

Is everyone available?

MR. SERCARZ: Your Honor, I have a sentencing in the State Supreme Court in New York.

THE COURT: How long do those usually take?

MR. SERCARZ: It is a question of first come first served, and I don't want to --

THE COURT: Can we do it in the afternoon?

MR. SERCARZ: Yes.

THE COURT: 2:00 o'clock?

MR. SERCARZ: Yes.

THE COURT: On the 26th of August, a Tuesday, for a status conference. This case is deemed a complex case for Speedy Act purposes. That designation continues until the trial.

Anything else?

All right. Thank you, everybody.

(Matter concluded.)

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